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Nos. 78-791 and 78-896

In the Supreme Court of the United States

OCTOBER TERM, 1978

MARVIN GREENBLATT, PETITIONER

v.

UNITED STATES OF AMERICA

FRANCIS HARRY BROWN A/K/A HARRY BROWN,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A24)[1] is reported at 583 F. 2d 659.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1978 (Pet. App. A25-A26). A petition for

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[1]"Pet." and "Pet. App." refer to the petition and appendix, respectively, in No. 78-791; the petition in No. 78-896 merely incorporates by reference all of the statements and arguments of the petition in No. 78-791.

rehearing was denied on October 13, 1978 (Pet. App. A27). The petition for a writ of certiorari in No. 78-791 was filed on November 13, 1978. The petition for a writ of certiorari in No. 78-896 was filed on December 5, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support petitioners' convictions for mail fraud.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted of the use of extortionate means to collect a debt, in violation of 18 U.S.C. 894 (Count 1); conspiracy to commit that offense, in violation of 18 U.S.C. 371 (Count 2); mail fraud, in violation of 18 U.S.C. 1341 (Counts 5, 6, and 9); conducting the affairs of an enterprise affecting interstate commerce through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count 13); and conspiracy to conduct the affairs of such an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count 14).[2] Petitioner Greenblatt was sentenced to concurrent terms of two years' imprisonment on each count, and petitioner Brown was sentenced to concurrent terms of three years' imprisonment on each count. The court of appeals reversed petitioners' mail fraud convictions on Counts 5 and 6 on the ground that the mailings alleged in those counts were not in execution of the schemes to defraud alleged in those counts (Pet. App. A13-A16). Petitioners' convictions on Counts 13 and 14 were reversed on the ground that the offenses charged in Counts 5 and 6, which

[2]Seven additional mail fraud counts (Counts 3, 4, 7, 8, 10, 11, and 12) were dismissed by the district court (Tr. 1516, 1528, 1563, 1565, 1576).

were also charged as acts of racketeering, may have formed essential parts of the pattern of racketeering activity found by the jury (Pet. App. A22-A24). The court of appeals affirmed petitioner's convictions on Counts 1, 2, and 9 (Pet. App. A17-A22).

ARGUMENT

1. Petitioners challenge only the affirmance of their convictions on Count 9 (mail fraud). They do not challenge the affirmance of their convictions on Counts 1 and 2 (use of extortionate means to collect a debt and conspiracy) for which they received sentences that are concurrent to the sentence imposed on Count 9. There is therefore no need for this Court to review their challenges to Count 9. *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).[3]

2. In any event, petitioners' challenge to their convictions on Count 9 is without merit. Their principal claim (Pet. 7-12) is that the district court, the court of appeals, and all of the parties including themselves and their counsel (who are also counsel on their petitions) made an incorrect factual assumption concerning the stipulated

[3]The court of appeals acknowledged (Pet. App. A5 n.2) that it had discretion under the concurrent sentence doctrine not to review the mail fraud counts, but nevertheless chose to do so. It is nevertheless appropriate for this Court to decline to exercise its discretionary review in view of the fact it is extremely unlikely that reversal of petitioners' mail fraud convictions would have any adverse collateral consequences to them. Petitioners' mail fraud convictions will not affect the time they would serve before release on parole under the guidelines of the United States Parole Commission (28 C.F.R. 2.20), and petitioners do not contend otherwise. Compare *Rubin* v. *United States*, No. 77-792 (October 2, 1978), in which this Court remanded a case to the court of appeals for consideration of the effect of unreviewed counts on parole release criteria.

evidence supporting the mailing that was alleged in Count 9. Petitioners, however, misread the indictment and the record.[4]

Count 9 alleged a scheme to defraud the Ford Motor Credit Company (FMCC), a subsidiary of Ford Motor Company. The essence of the scheme alleged and proved was that petitioners, the president and general manager of a Lincoln-Mercury dealership in Chestnut Hill, Pennsylvania, learned in April 1975 that Ford Motor Company was about to terminate their financially troubled dealership. On April 10, 1975, they submitted a request, through the mail, to FMCC in Michigan for financing three used cars under a type of financing arrangement known as a "floor plan." Under such a plan a dealership may borrow money from FMCC by giving FMCC a security interest in specified new and used cars that the dealership holds for sale and in the proceeds of the sale of such cars (Pet. App. A9-A10, A17-A21; Tr. 213-223).

On April 16, 1975, shortly before their dealership was to terminate, petitioners sold 38 cars for $175,000 in cash, which was almost 10 times the amount they had ever before received on a single day (Tr. 93-96, 722, 830-831). Three of the cars had been floor planned with FMCC pursuant to petitioners' request of April 10, 1975 (Tr. 242-243). On the evening of April 16, petitioners informed the police that their business had been robbed of a large amount of cash (Tr. 262-267). The "robbery" was never solved, and as a result of the disappearance of the sales proceeds, FMCC lost $159,000 on the cars that were sold on April 16 in which it had a security interest, including the three cars that were "floor-planned" under the April

[4]Petitioners' allegation that the court of appeals misapprehended the evidence was made in their petition for rehearing. The court of appeals requested and received a response from the government on this point, after which it denied rehearing.

10 request. Count 9 alleged that the robbery had been staged by petitioners to defraud FMCC.

Petitioners do not dispute that the evidence established a scheme to defraud. Rather, they contend that the mailing alleged in the indictment was not shown to be in furtherance of that scheme within the meaning of 18 U.S.C. 1341 because, they contend, the April 10, 1975, mailing alleged in Count 9 "was not, in fact, the actual mailing which did occur," since the stipulated "evidence was that the mailing was from Ford Credit to Chestnut Hill" (Pet. 7).

Petitioners are incorrect. Count 9 of the indictment alleged that on or about April 10, 1975, petitioners, "for the purpose of executing the aforesaid scheme and artifice * * * did knowingly cause to be placed in an authorized depository for mail a copy of Chestnut Hill Lincoln Mercury's request for wholesale financing from Ford Motor Credit Company to cover financing of used vehicles Chestnut Hill Lincoln Mercury was holding for resale." As proof that petitioners caused that request to be mailed to FMCC, the parties stipulated that the approved request form, which petitioners had made out and sent to FMCC, was mailed back to petitioners in Chestnut Hill from FMCC in Michigan (Tr. 575). That stipulated evidence, however, was not the mailing that was alleged in Count 9, but simply part of the proof that the alleged mailing had occurred and that petitioners had caused it to occur.[5]

[5]The evidence on this point also showed that the request-for-financing form was delivered by petitioners to the FMCC branch office in Wayne, Pennsylvania, and the branch manager of that office testified that such requests are regularly mailed to FMCC in Dearborn, Michigan (Tr. 221-225). While the record is not clear whether petitioners mailed the form to the Wayne office, it was sufficient to show that the mailing of the form to Dearborn was reasonably foreseeable by petitioners. *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954).

Petitioners have simply misread the record and the indictment on this "critical" (Pet. 8) matter. When the indictment and record are correctly read, it is clear, as the court of appeals held (Pet. App. A17-A21), that the April 10 request for financing that petitioners caused to be mailed was in furtherance of the scheme to defraud; indeed, it was integral to the scheme.[6]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Petitioners' further arguments, that the alleged mailing was not in furtherance of the scheme within the meaning of 18 U.S.C. 1341 because it was made after completion of the fraud and because it was a routine business mailing (Pet. 11-15), are premised on the incorrect assertion that the relevant mailing was the mailing from FMCC to petitioners.

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